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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ANTHONY JOSEPH PETRILLI,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 277

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

BRYAN PURTEET,
705 Olive Street,
St. Louis, Missouri,
Attorney for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

Page

PETITION FOR WRIT OF CERTIORARI..... 1–8

Summary 1
Statute involved 2
Statement 3
Petitioner not shown in automobile..... 3–4
Petitioner not identified as being one of robbers.. 4
Jurisdiction 4
The questions presented 5
Reasons for granting writ 6

BRIEF IN SUPPORT OF PETITION.....9–27

Opinion below 9
Jurisdiction 9
Statement of case 9
Specifications of error 10
Argument 12
I. The petitioner did not receive a fair trial.... 12
(a) Unfair to read aliases to jury and not prove them 12
(b) Unfair to call petitioner gangster..... 14
II. Evidence is insufficient 15
(a) The Circuit Court misstated the evidence 15
(b) The Circuit Court considered matters outside the record 15
(c) The Circuit Court decision misconstrued corpus delicti 16
(d) Corpus delicti properly defined..... 16
(e) Circumstantial evidence in case did not exclude every reasonable hypothesis of innocence 17
III. There is a variance 19
(a) No proof in particularity of that which was alleged with particularity..... 20

IV. Proof failed to show possession in petitioner.. 24

V. No proper proof of market value of jewelry in Texas 23

VI. Court erroneously charged jury that evidence showed petitioner in possession of stolen jewelry 23

VII. The Court's sentence is void 25

(a) When Court charges jury as if defendant were accessory after the fact, sentence may be only half of maximum..... 26

VIII. Circuit Court of Appeals' decision failed to consider all assignments of error..... 26

(a) It is the duty of the Supreme Court to correct the errors of the Circuit Court of Appeals and give full review to entire case 27

Conclusion 27

Table of Cases Cited.

Brady v. U. S., 24 F. (2nd) 399.....10, 18
D'Allessandro v. U. S., 90 F. (2nd) 640.....6, 10, 13
Forte v. U. S., 94 F. (2nd) 236.....10, 16
Husten v. U. S., 95 Fed. (2nd) 440..... 23
Isbell v. U. S., 227 F. 788.....10, 19
Kutler v. U. S., 79 F. (2nd) 440.....7, 21
Pearlman v. U. S., 10 F. (2nd) 460.....10, 16
U. S. v. Howard, 3 Summ. 12, 14, 15.....7, 10, 20
U. S. v. Salowitz, 99 F. (2nd) 714.....6, 10, 12
Van Gorder v. U. S., 21 F. (2nd) 939.....10, 18
Willsman v. U. S., 286 F. 582.....10, 11, 22, 24

Statutes Cited.

Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925 (U. S. C. A., Title 28, Sec. 347)..... 4, 9
18 U. S. C. A., Section 415.....2, 26
18 U. S. C. A., Section 551.....11, 26

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No. .....,

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals of the Eighth Circuit, entered in the above cause on July 8, 1942, affirming the judgment and conviction of the United States District Court for the Eastern Division of the Eastern Judicial District in the City of St. Louis, State of Missouri, convicting petitioner of violation of 18 U. S. C. A., Section 415, 53 Stat. 1178.

SUMMARY.

This is a criminal case commenced in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri by a one-count indictment (R. 5-9) returned by grand jury and filed in court on the 23rd day of June, 1941.

Your petitioner was tried on November 12, 1941, and verdict of the jury was guilty. The Court on the 13th day of November, 1941, sentenced petitioner to ten years im-

prisonment. Petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court, on July 8, 1942, affirmed the decision of the lower court (which opinion is not yet reported, but printed at R. 103-110).

STATUTE INVOLVED.

18 U. S. C. A., Section 415:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an 'obligation or other security of the United States,' as defined in section 261 of this title or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note, issued by any 'foreign government' as defined in section 288 of this title, or by a bank or corporation of any foreign country. May 22, 1934, c. 333, Section 3, 48 Stat. 794, as amended Aug. 3, 1939, c. 413, § 1, 53 Stat. 1178."

STATEMENT OF THE CASE.

At 8:30 o'clock a. m. on February 7, 1940, Thomas Slifkin, a jewelry salesman, left the Adolphus Hotel at Dallas, in the State of Texas, and drove in his automobile past the Town of Garland, Texas, when a car (not the one described in the evidence) approached and pushed him off the road. One man was waving a gun at him. Slifkin testified (R. 19) he did not have the least idea who the men in the car were. Slifkin saw two men. They commanded him to turn his head and get in the back of his own car where he was caused to lie on the floor covered up under some coats. The two men talked to him about the jewelry, code mark, price, etc., and drove with him in his car for several hours, releasing him at 2:15 o'clock p. m. thirty-five miles west of Texarkana, Arkansas, in the State of Texas (R. 21).

At 5:30 o'clock a. m. on February 8, 1940, two Missouri State Highway Patrolmen were sitting in an automobile near the intersection of Lindbergh road and Highway No. 66 (which is just outside and west of the city limits of the City of St. Louis, Missouri) when a Ford car bearing Minnesota state licenses passed, eastbound toward St. Louis. It was misty and freezing (R. 44). The patrolmen testified that the Ford was traveling between 60 and 65 miles per hour; that they gave chase; that the Ford increased its speed to about 85 miles per hour; that there were two men in the front seat of the car and one in the rear seat; that the Ford hit a concrete abutment which held up an intersection sign at U. S. Highway No. 66 and Laclede Station road and turned over on its left side; that they were more than fifty yards from the Ford when it turned over; that they found two men in the overturned car; that they found petitioner "in front of a filling station located on the north side of the highway about twenty-

five yards from the scene of the accident" (R. 35-6, 43-4-5). Neither patrolman knew who was in the Ford at the time they gave chase and before it turned over (R. 41-2). Neither patrolman would say that they ever saw petitioner in the Ford. The two occupants of the wrecked Ford and petitioner were placed in an ambulance and the driver thereof was directed to take them to a hospital. The wrecked Ford car was towed a block away to Horst Auto Station, where the patrolmen found a large leather satchel in the rear seat containing jewelry. There was no definite or particular description of the jewelry given by the witness. At record page 37 one patrolman said: "It had several rings in it. There were several individual ring boxes containing rings." At record page 45 the other patrolman described the jewelry as "rings and settings for ladies' and men's rings. There were brooches in there and pins." Neither patrolman produced any of the jewelry nor a list thereof.

The prosecution made no effort to show where the wrecked car came from or that it ever crossed any state line; that petitioner was ever in the State of Texas, or that the wrecked automobile was ever outside Missouri or beyond the limits of St. Louis County, Missouri.

Slifkin testified (R. 19) that he did not know who took the jewelry; that he had not seen the petitioner in the State of Texas.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

THE QUESTIONS PRESENTED.

1. Petitioner did not receive a fair and impartial trial because the indictment contained twenty-eight aliases which were read to the jury, Government counsel assuring the Court that he would prove the aliases. The Government closed without proving a single one of the aliases. Government counsel in his closing argument to the jury called the petitioner a "gangster."

2. The evidence is insufficient to sustain conviction.

3. There was a variance between the allegations and the proof. The indictment describes sixty-one items of jewelry in particularity, but the Government offered no proof in particularity.

4. The proof failed to show that petitioner possessed the alleged stolen property.

5. There was no proof that the jewelry found in St. Louis County had a fair market value of $5,000 in Texas.

6. The Court erroneously charged that the evidence showed that the defendant was in possession of the jewelry.

7. The sentence pronounced by the Court is void.

8. The decision of the Circuit Court of Appeals incorrectly states the evidence and contains statements not supported by the record.

9. The Circuit Court of Appeals refused to pass upon all the points raised in petitioner's appeal.

REASONS FOR GRANTING APPLICATION FOR WRIT.

1.

The decision of the Circuit Court of Appeals regarding the matter of aliases is in conflict with the decision of the Third Circuit Court of Appeals in the case of D'Allessandro v. United States, decided June 10, 1937, 90 F. (2nd) 640, wherein the Court said:

> "None the less, the string of aliases may be so arranged as to carry the implication that the defendant belongs to the so-called criminal class and thus half convict him as soon as the indictment is disclosed to the jury."

In the case at bar the Assistant United States Attorney opened the prosecution by reading the indictment and the aliases. Counsel for petitioner objected and warned the Court that, unless the aliases were proved, petitioner would move for a dismissal. The Assistant United States Attorney said, "We are going to prove these aliases" (R. 15). None of the aliases were proved.

In the Seventh Circuit, in the case of United States v. Salowitz, decided October 19, 1938, 99 F. (2nd) 714, the Court said:

> "Of course, if a person has used names other than his right name, as the record discloses was the case so far as appellant is concerned, and the government proved such aliases, there can be no legitimate complaint. Otherwise, it is not difficult to see how a defendant might be prejudiced before a jury."

In the case at bar it is seen that the Government deliberately set the trial in an atmosphere of prejudice with a backdrop of passion in order to sway the jury, then fanned the flames of passion and prejudice by shouting, in the closing argument, that the defendant was a gangster,

"the purpose of that statute, and you men know what the purpose was, is to stop gangsters, like these men here, who are robbing men on the highway and transporting the property taken * * *."

These tactics deprived the petitioner of a fair and impartial trial as guaranteed by the Constitution.

2.

The decision of the Circuit Court of Appeals in sanctioning such unfair trial tactics so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3.

The decision of the Circuit Court of Appeals in refusing to pass upon all of the errors assigned and briefed by petitioner constitutes a violation of the Fifth Amendment in that it deprives petitioner of his liberty without due process of law.

4.

The Circuit Court of Appeals' decision as to the Government's failure to prove in particularity that which was alleged in particularity is contrary to the ruling of this Court in United States v. Howard, 3 Summ. 12, 14, 15, and in conflict with the case of Kutler v. United States, 79 F. (2nd) 440, 3rd Circuit. The indictment alleging sixty-one items in particularity, it was encumbent upon the Government to prove these item by item with particularity and not by generalizations, as it did (R. 24, 25).

5.

It is the duty of the Circuit Court of Appeals to state the facts accurately (see account of misstatement, page 15 of supporting brief). It also is the duty of the Circuit Court to pass on all assignments of error it refused (R. 107), pass on assignments 3 (R. 96), 4 (R. 97-98), 5 and 6 (R. 99), 6 and 7 (R. 106). The Circuit Court having so failed, it is the duty of this Court to review these assignments in order to determine if petitioner had a fair trial.

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

BRYAN PURTEET,
Attorney for Petitioner.

Dated St. Louis, Mo., July 31, 1942.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ANTHONY JOSEPH PETRILLI,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet reported, but will be found annexed to the transcript of the record, page 103.

JURISDICTION.

The opinion of the Circuit Court was rendered on July 8, 1942. On July 21, 1942, an order was entered staying the mandate of the Circuit Court of Appeals for the purpose of permitting the within application for a writ of certiorari.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATEMENT OF CASE.

The statement of the case is contained in the petition.

SPECIFICATIONS OF ERROR.

I.

The petitioner did not receive a fair trial, because the Government read twenty-eight aliases to the jury and then failed to offer proof as to a single one of them.

United States v. Salowitz, 99 F. (2nd) 714;
D'Allessandro v. U. S., 90 F. (2nd) 640.

II.

The evidence is insufficient to sustain conviction.

Pearlman v. U. S., 10 F. (2nd) 460;
Forte v. U. S., 94 F. (2nd) 236;
Brady v. U. S., 24 F. (2nd) 399;
Van Gorder v. U. S., 21 F. (2nd) 939;
Isbell v. U. S., 227 F. 788.

III.

The proof does not follow the allegations. There is a variance between allegation and proof. The indictment sets forth and describes in particularity sixty-one items, but no proof in particularity was made.

U. S. v. Howard, 3 Summ. 12, 14, 15;
Kutler v. U. S., 79 F. (2nd) 440.

IV.

The proof failed to show that the defendant possessed the alleged stolen property.

Willsman v. U. S., 286 F. 582.

V.

There was no proof that the jewelry found in St. Louis County had a fair market value of five thousand dollars in Texas.

VI.

The Court erroneously charged that the evidence showed the defendant was in possession of the stolen property.

Willsman v. U. S., 286 F. 582.

VII.

The sentence pronounced by the Court is void.

Title 18, U. S. C. A., Section 551.

VIII.

The Circuit Court of Appeals' decision did not fully consider the issues raised.

ARGUMENT.

1.

The Petitioner Did Not Receive a Fair Trial, Because the Government Read Twenty-Eight Aliases to the Jury and Then Failed to Offer Proof as to a Single One of Them.

The petitioner was practically convicted before a word of testimony was adduced, because the Government, in order to prejudice the jury against appellant, read a list of twenty-eight aliases. Appellant objected (R. 15) and warned the Court that such was objectionable, but when the Government counsel said to the Court, "WE ARE GOING TO PROVE THESE ALIASES," the Court permitted counsel to proceed. The Government closed without proving a single one of the aliases. Such prejudicial tactics ought not to receive the approval of any United States Court. The point is fully raised, objection and warning (R. 15) in appellant's motion for directed verdict (R. 73). We now urge the Court to condemn this unfair practice and set this point at rest in the interest of fair trials. Other courts have condemned this practice and indicated when the point is properly raised that the practice will be denounced.

In United States v. Salowitz, 99 F. (2nd) 714 (1938), the Court commented on the practice of indicting a defendant under aliases as follows:

> "It is also urged that appellant was prejudiced by charging him and his co-defendant under a number of aliases. True, this practice has been criticized by some courts, and, we think, not without merit. Of course, if a person had used names other than his right name, as the record discloses was the case so far as appellant is concerned, and the government proves such aliases, there can be no legitimate com-

plaint. Otherwise, it is not difficult to see how a defendant might be prejudiced before a jury. We do not believe, however, the aliases attached to appellant's co-defendant, under the circumstances shown to exist, could have any harmful effect as to appellant."

Again, in D'Allessandro v. United States, 90 F. (2nd) 640 (1937), the defendant was indicted and tried under a long string of aliases, i. e., Joseph D'Allessandro, alias Joe Reno, etc. The Court held:

> "Another practice which provokes comment is that of loading a defendant with a long list of aliases. This, it is true, may afford protection to a defendant, if called upon to prove former jeopardy. None the less, the string of aliases may be so arranged as to carry the implication that the defendant belongs to the so-called criminal class and thus half convict him as soon as the indictment is disclosed to the jury.
>
> "This appellant, however, cannot be heard to complain either of the form of the indictments or of their having been submitted together to the jury, because he made no appeal to the Court to protect him from the evil consequences which he now charges followed."

The Court will observe, that in the first few minutes of the trial, the prosecution bombed the petitioner with poisonous allegations it was not prepared to prove, except by the naive method supplied de hors the record and repeated by the Court at R. 110. It seems that both learned prosecutor and the august Court have completely forgotten the spirit and the letter of the commandment that "Nor shall he be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law" (Fifth amendment). The Court's statement of how and what the prosecutor (R. 110) said he had expected to

prove, justifies the inference that there was deliberate intent to prejudice the defendant, because he must have known that a defendant is not required to take the stand and, in most cases, never does.

The statement of the Court (R. 108) as to the state of mind of defendant is not a cogent reason for denying the petitioner his liberty and is flatly contradicted by the record at page 84:

> "While the Court undertook, in so far as it was possible for it to do so, to withdraw from consideration of the jury the allegation of the aliases, we believe that this is impossible to do, since the United States Attorney persisted in reading those; therefore, the poison being in, it cannot effectively be removed, and that the defendant has been **prejudiced by this unfair method** pursued by the United States Attorney, and for these reasons we now request the Court to refuse to let the indictment go to the jury, **because it contains those prejudicial matters.**"

The whole atmosphere of the trial of this case was deliberately surcharged with passion and prejudice by the prosecution, from beginning to end. Beginning with the reading of the aliases and ending with the prosecutor shouting "gangster" to the jury in his closing argument (R. 76):

> "Mr. Robinson: You men know why that statute was passed. We didn't have any highways and high-powered automobiles during the time of our forefathers. The purpose of that statute, and you men know what the purpose was, is to stop gangsters, like these men were, who are robbing men on the highway and transporting the property taken——"

The Circuit Court of Appeals refused to consider this assignment of error and dismisses it at Record 107 with the statement, "There is no occasion to go on spelling out

inescapable answers to patent propositions." We feel certain that judicial interpretation must consider every phase of a case, and that if the Court had considered this prejudicial statement in connection with the reading of the alleged aliases, the failure to prove them, that then it could not have asserted that there was no prejudice in the trial of this case. Liberty is too precious to be given such short shrift.

2.

The Evidence Is Insufficient to Sustain Conviction.

The opinion reveals misstatements of facts and even the mention of facts not in the record. For instance, at Record 104, "Appellant was apprehended a short time later." There is not a single word in the record that shows appellant was arrested a short time after the ambulance left the scene of the accident, or, for that matter, any other time. The only hint in the record as to when petitioner might have been arrested is at Record 9, when he applied for a bond on October 1, 1941, which is about twenty-one months after February 8, 1940, the date alleged in the indictment (R. 5) as being the date of the alleged crime.

At Record 104: "Slifkin's brief case with the jewelry was found in the car, and he duly made an identification of all of the articles at the office of the highway patrol on the following day." The record nowhere shows that Slifkin made the identification on the following day.

The Government did not prove in particularity what jewelry was stolen in Texas or what jewelry was found in the Minnesota car.

At Record 106:

> "In addition, he had previously described generally the character of the articles stolen, and he had further produced a detailed list of the sixty-one several items, which he had prepared and was carrying with him as a personal inventory at the time of the robbery, and

> which was made available to appellant's counsel for purposes of comparison and cross-examination."

This Court will see, at Record 19, that the memorandum was never identified or introduced in the evidence, and that the question was withdrawn by the prosecution.

A careful and accurate reading of the record shows, in the first place, there was no proof of the corpus delicti.

Our brief below was either not clear or the Court misconstrues the definition of "corpus delicti," as the Circuit Court seems to be of the opinion (R. 106) that the alleged stolen jewelry was the corpus delicti.

In the case of Pearlman v. United States, 10 F. (2nd) 460, under the Dyer Act, it was indicated that the corpus delicti there is the transporting of a stolen automobile across state lines with the knowledge that it is a stolen car.

Hence it will be seen that the knowledge of the stolen character of the goods at the time of their transportation is really the corpus delicti. Hence, the absence of proof that the accused was at the scene of the robbery deprives the Government of a very necessary point of proof which it would seem could only be supplied by the defendant's confession. There was no confession in this case. In the Pearlman case it was easy enough for the Government to show that the automobile was stolen property. However, it was very difficult for it to show that Pearlman had stolen the car or knew it was stolen, and, while the Court held it was most necessary, it ruled that the missing link of evidence had been supplied by Pearlman's confession to the police when he said to them, "Well, you have me and that is all there is to it."

Forte v. United States, 94 F. (2nd) 236, contains the best definition of corpus delicti in transportation cases (l. c. 243):

> "In the instant case the corpus delicti is transportation of the vehicle in interstate commerce from the District of Columbia to Maryland knowing it was

stolen. The contention of the Government that the scienter is not a necessary element of the corpus delicti cannot be sustained. There is nothing criminal under the statute about transporting a vehicle across state lines unless the person transporting it knows it to be stolen. The law is well settled that the corpus delicti includes not only the body or fact of the wrong, in the sense of the death in homicide or the loss of the chattel in larceny, but also the criminal means by which the same came about. See 4 Wigmore, Evidence (2d Ed., 1923), Section 2072, where the learned author, first expressing the personal view that the term corpus delicti ought to be taken to include only the first element, the fact of the injury or loss, and not the second, the criminality which is the source of the loss, nevertheless concedes that 'by most judges the term is made to include the second element also.' "

The record is most inconclusive as to what jewelry was actually stolen in Texas. The method of proving the allegation of the indictment by the indictment itself is certainly violative of every rule of law and reason and permits the witness to invade the province of the jury.

This case is devoid of any proof that the property described in the indictment was carried across any state line. The Ford car was not shown by any testimony to have been in any place other than St. Louis County, Missouri. The proof wholly fails to show that appellant transported either the jewelry described in the indictment or the jewelry found in a wrecked automobile at the intersection of U. S. Highway No. 66 and Laclede Station road.

The Government predicates its whole case on the fact that appellant was found in a dazed condition twenty-five yards (seventy-five feet) away from the wrecked automobile. No witness could or would say appellant was in the Ford car.

From this one circumstance, which is just as consistent with innocence as guilt, the jury had to presume there had been a robbery of the particular jewelry described in in-

dictment in Texas; then the jury had to presume that the jewelry found in St. Louis County was that same jewelry taken in the robbery in Texas; and then the jury had to presume on these—presumption upon presumption—that defendant knew of the robbery in Texas and thereafter caused the jewelry to be transported across state lines.

> "It is well settled that presumptions cannot be based upon presumptions." Brady v. United States, 24 F. (2nd) (C. C. A. 8) 399, l. c. 404.

There are a number of obvious explanations for appellant being found dazed off the roadway and seventy-five feet away from the wrecked car, and this circumstance is not sufficient to overcome the presumption of innocence—this fact is not inconsistent with his innocence.

In Van Gorder v. U. S. (1927, C. C. A. 8), 21 F. (2d) 939, wherein the defendant was convicted of stealing two post office keys and wherein the only evidence against him was the possession of the said keys, the Court made the following comments on the sufficiency of circumstantial evidence:

> "In order to sustain a conviction of a crime on circumstantial evidence it must be such as to exclude every reasonable hypothesis but that of guilt of the accused; the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. Vernon v. U. S. (C. C. A.), 146 F. 121, 123, 124. The Circuit Court of Appeals of the Second Circuit in Norowitz v. U. S., 282 F. 575, 579, declared that: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiff in error.' To the same effect are * * *.
>
> "The evidence in this case utterly failed to exclude every other hypothesis but that of guilt. The hypoth-

esis that one of the clerks in the post office who was present there in the morning of January 17, 1924, picked up the keys which the substitute letter carrier had left lying on the table outside the money order department, dropped or laid them elsewhere, whence they had been transferred by him or others until they had come to the possession of the defendant, the hypothesis that some thief had stolen them, then lost them, and the defendant had innocently found them, or that in many other ways without the theft of the defendant they had come to his possession, is under all the evidence, more probable in the face of the legal presumption of the defendant's innocence and the requirement that his guilt be proved by the Government beyond a reasonable doubt before his conviction, than the hypothesis that he was guilty of this crime."

In Isbell v. U. S., 227 F. 788 (8 Cir., 1915), the Court went to great length to explain the following rule:

> "Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, **and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.**" (Emphasis ours.)

3.

The Proof Does Not Follow the Allegations. There Is a Variance Between Allegation and Proof. The Indictment Sets Forth and Describes in Particularity Sixty-One (61) Items, But No Proof in Particularity Was Made.

This indictment sets forth sixty-one (61) articles of jewelry with particular descriptions. The proof failed to describe the articles in particularity. The Circuit

Court, in effect, said that with what particularity the proof must follow the allegations might be a question when properly raised. The proposition was properly raised (R. 72) both by motions for directed verdict and in exceptions (R. 83) and the point was squarely before the Court, but the opinion here (R. 106) seeks to shift the burden to petitioner to supply by cross-examination that which the prosecution has failed to prove. It is elementary that the prosecution must first support the allegations of the indictment.

There can be no question that, from the standpoint of jeopardy, fair trial and plain justice, when the indictment describes with particularity, that the proof must follow the allegations. Allegata et probata.

Numerous decisions are found for the proposition that when a person, place or thing, necessary to be alleged, is described more particularly than is necessary, the allegation must be proved, because such words are requisite to the identity of that which is legally essential.

Within this class, opinions are legion which show that a description of money as silver or gold certificates, current money, merchandise, etc., are matters of description within the exception.

In the case of United States v. Howard, 3 Summ. 12, 14, 15, we find the first application of the exception in the federal courts. Therein Justice Story said as dicta:

> "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can be rejected as surplusage. * * *"
>
> "On the other hand, if a man should be charged with stealing a black horse, the allegation of color, although unnecessary, yet, being descriptive of that which is material, could not be rejected as surplusage. 2 Russ. Crimes 706. So upon an indictment for stealing live tame turkeys, the description of live could

not be rejected as surplusage, and proof of stealing dead turkeys would not support the indictment. That was so held in Rex v. Edwards, Russ. & R. 497."

In the recent 1935 Circuit Court of Appeals case of Kutler v. U. S., 79 F. (2nd) 440 (C. C. A. 3 Pa.), the Court, in the course of the opinion, said:

"Where there is an allegation which describes, defines, qualifies, or limits a matter material to be charged, it is taken as a descriptive averment, and the general rule is that it must be proved as laid, even though such particularity of description was unnecessary. Trice v. State, 116 Ga. 602, 42 S. W. 1008; U. S. v. Howard, 26 Fed. Case 388, No. 15,403; State v. Lashus, 67 Me. 564; State v. Langley, 34 N. H. 529; Commonwealth v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652. In the case at bar the word 'receiver' describes John M. Hill and such description was essential. It was accordingly necessary for the Government to prove it, but the evidence showed that the description was false and the variance was fatal."

4.

The Proof Failed to Show That the Defendant Possessed the Alleged Stolen Property.

It is crystal clear that the witness testified that appellant was never seen in the wrecked car—the nearest he is ever placed to it is 75 feet away in a filling station driveway in a dazed condition. Some jewelry was found in the automobile. Whether it was jewelry taken in Texas is doubtful and not clearly proven by competent evidence. Such facts do not warrant the assumption that appellant was in possession of the stolen jewelry or any jewelry, and the law will not permit the jury to ignore the presumption of innocence by the inference which arises from the possession of recently stolen property. POSSESSION MUST BE PERSONAL AND EXCLU-

SIVE. APPELLANT WAS NOT SHOWN TO POSSESS THE JEWELRY.

> "The general rule is that possession, to be incriminating, must be personal and exclusive." Willsman v. U. S., 286 F. 582.

The presumption of possession of recently stolen property does not and could not possibly apply to the facts in this case, because the evidence fails to show that the petitioner was in the automobile or that he transported the jewelry from the State of Texas to the State of Missouri. Even if petitioner had been shown by direct evidence to have been in the car, the evidence would still be insufficient to convict petitioner, because the proof in the case does not show that petitioner was in the State of Texas or carried the jewelry described in the indictment across any state line, or that he had knowledge of such transportation. To reach such a conclusion, it is necessary to pyramid presumptions: (1) It must be presumed that he was in Texas; (2) that he had knowledge that the jewelry described in the indictment was stolen in Texas, and (3) that he transported it across state lines. In the evidence as it stands there is none to show that he was present in Texas or that he had any knowledge that the jewelry described in the indictment was stolen and transported across state lines.

The Circuit Court of Appeals ignores the rule of law that there must be substantial evidence which excludes every other hypothesis but that of guilt in order to convict on circumstantial evidence, by ruling at record 104, that the jewelry here was stolen in Texas and transported to Missouri, and assumes outside the record that it was possible to reach Missouri in the time elapsing between 2:15 p. m. one day and 5:30 a. m. the next; that the Minnesota Ford did such; and that the petitioner was in that car, when the record shows that no witness would say peti-

tioner was in the car and against the fact that he was found seventy-five feet away from the car off the road in a filling station lot. He might have been there from any number of reasons or causes other than that assumed by the Court.

5.

There Was No Proof That the Jewelry Found in St. Louis County Had a Fair Market Value of $5,000.00 in Texas.

The proof of the value of the jewelry is cloudy. We submit that cross-examination of witness Hoeman (R. 62) shows that he was no expert at all. **Furthermore, the Government's failure to produce the jewelry at the trial deprived appellant of the right to have jewelry appraised by a qualified and disinterested expert.** No proof was offered to show the value in Texas of the property found in St. Louis County, or that described in the indictment. The Eighth Circuit Court of Appeals held, in Husten v. U. S., 95 Fed. (2) 440, that the value of stolen property is the market value at the time and **place** of taking.

6.

The Court Erroneously Charged That the Evidence Showed the Defendant Was in Possession of the Stolen Property.

The Court's charge (R. 82) injected another unauthorized and prejudicial factor in the case when the Court charged:

> "There is evidence in this case to the effect that the jewelry in question was stolen. In this connection the jury is entitled to consider as a circumstance in the case the fact, if you believe it to be a fact, that the jewelry was shortly thereafter in the possession of the defendant."

There was no evidence that the defendant was ever in possession of a single piece of the alleged stolen jewelry or any other jewelry; therefore the Court tried to draw an inference from the thin air, not from any fact in the case, and thereby misled the jury into thinking that matters not in the record were circumstances in the case. **There was not even any competent evidence that the jewelry described in indictment was stolen.**

The Court, after exception by appellant, realized its error and undertook to withdraw this prejudicial charge from the jury (R. 84). Unfortunately poison cannot be withdrawn from the veins of a lawsuit by any such simple expedient. Jurors heed what they first hear.

The mere fact that jewelry was found in a wrecked car occupied by two men seventy-five feet from where appellant was found injured raises no presumption of possession on his part.

In the case of Willsman v. United States, 286 F. 852 (8 Cir.), the Court said:

> "The general rule is that possession, to be incriminating, must be personal and exclusive."

Thus we see the case is replete with instances and incidents which plainly militated against a fair trial. First, the prosecutor read a long list of aliases to create an unfavorable impression; then he followed this up by calling the petitioner a gangster; then the Court misstated the evidence (R. 82), and finally, at record page 79, attempts to condone the mistake of the prosecution by instructing the jury to forget that it had heard the prosecutor read aliases and solemnly assure the Court he would prove them; forget that the prosecutor called the petitioner a gangster, and forget that the Court misstated the evidence. The minds of laymen are too frail to hear so much prejudicial matter and forget it. How could the jury

forget any of these things when their minds had been inflamed by tactics which charge the court room with prejudice?

7.

The Sentence Pronounced by the Court Is Void.

Finally, the Circuit Court of Appeals refused to consider assignment No. 7, which was stated and argued in our brief below:

> The sentence pronounced by the court is void because the court charged the jury as if appellant were an accessory after the fact; then, after verdict of "guilty" imposed maximum sentence, when section 551, title 18, requires that sentence be only half of maximum.

The Court, apparently realizing that the evidence failed to show appellant at the scene of the Texas robbery, and did not show appellant carried any stolen property across state lines, and failed to place defendant in the automobile where some jewelry was found, apparently concluded that appellant might be an accessory after the fact. At any rate, the Court gave the following charge (R. 82):

> "Another point should be called to your attention and that is based upon a federal statute. The statute, in effect, provides that there is no distinction as between the guilt of a principal and the guilt of an accessory; that one may be charged and prosecuted as a principal, and if it turns out that he is only an accessory he may, nevertheless, be convicted. A principal is one who actually commits a crime. An accessory is one who willfully aids, abets, counsels, or commands the commission of the offense. All persons who act together with a common intent in the commission of a crime are equally guilty, and if two or more persons are so acting together with a common intent and purpose in the joint execution of the plan,

then the act of each one is binding upon the other, and this is true, regardless of whether the others are present or not."

Such a charge, taken in connection with the erroneous charge on circumstantial evidence and erroneous statements concerning possession, as above set out, undoubtedly strongly influenced the finding of the verdict of guilty.

Having given such a charge, the Court was bound to sentence appellant under the provisions of Title 18, U. C. C. A., Section 551:

> "Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years."

The maximum sentence under section 415 is ten years, which the Court imposed, when it should have imposed only five years. Therefore, the sentence as imposed is void.

8.

The Circuit Court of Appeals' Decision Did Not Fully Consider the Issues Raised.

It was error for the Circuit Court of Appeals to refuse to consider petitioner's assignment of error No. 3 at record 96-97; assignment of error No. 4 at record 97-98; assignment of error No. 5 at record 99; assignment of error No. 6 at record 100; assignment of error No. 7 at record 100-101.

The Court's refusal to consider petitioner's assignment of error No. 3, which complained that the Assistant United

States Attorney called the petitioner a "gangster" avoided the necessity of further noticing the prejudicial manner in which this case was tried. However, such procedure condones unfair trial tactics and deprives defendant of liberty without due process of law. This episode throws light on the prejudicial atmosphere, and when all such incidents are added together reveals an unfair trial.

It is the duty of the appellate court to review all points raised in an appeal. To refuse to review all points raised renders the right of appeal futile. In this case one of the primary points was unfair and prejudicial acts by the prosecutor, but, notwithstanding this, the Court is at pains (R. 107) to show that no prejudice existed. It would seem, therefore, that the Court should have passed on assignment No. 3 (R. 96), which complained that Government counsel in argument to the jury referred to defendant as "gangster." The episode in the trial is shown at R. 76. Since the Circuit Court of Appeals failed to pass on all the issues in the case, it would seem that it is the duty of this Honorable Court to grant certiorari to the end that the petitioner's case be fully reviewed.

CONCLUSION.

It is therefore respectfully submitted that, for all the foregoing reasons, the petitioner's application for a writ of certiorari should be allowed as prayed.

Respectfully submitted,

BRYAN PURTEET,
Attorney for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Balman v. *United States*, 94 F. (2d) 197	8
Bennett v. *United States*, 227 U. S. 333	9–10
Bennett v. *United States*, 104 F. (2d) 209	7
Berger v. *United States*, 295 U. S. 78	9
Bimbo v. *United States*, 82 F. (2d) 852, certiorari denied, 297 U. S. 721	10
Boehm v. *United States*, 271 Fed. 454	8
Chadwick v. *United States*, 117 F. (2d) 902, certiorari denied, 313 U. S. 585	6
D'Allessandro v. *United States*, 90 F. (2d) 640	6
Drew v. *United States*, 27 F. (2d) 715	8
Dunbar v. *United States*, 156 U. S. 185	10
Hall v. *United States*, 168 U. S. 632	10
Hoffman v. *United States*, 20 F. (2d) 328	6
Hoke v. *United States*, 227 U. S. 308	9
Husten v. *United States*, 95 F. (2d) 168	7–8
Kutler v. *United States*, 79 F. (2d) 440	10
McNamara v. *Henkel*, 226 U. S. 520	8
Montgomery v. *United States*, 162 U. S. 410	10
Murphy v. *United States*, 39 F. (2d) 412	6
Rosenblatt v. *United States*, 271 Fed. 435, certiorari denied, 256 U. S. 695	10
Russell v. *United States*, 119 F. (2d) 686	4, 7
United States v. *Brims*, 272 U. S. 549	9
United States v. *DiCarlo*, 64 F. (2d) 15	8
United States v. *Howard*, 26 Fed. Cas. No. 15,403	10
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	6
United States v. *Solowitz*, 99 F. (2d) 714	6

479353—42

Cases—Continued. Page

Vause v. *United States*, 53 F. (2d) 346, certiorari denied, 284 U. S. 661 6

Wilkerson v. *United States*, 41 F. (2d) 654, certiorari denied, 282 U. S. 894 8

Willsman v. *United States*, 286 Fed. 852 8

Wilson v. *United States*, 162 U. S. 613 8

Statutes:

Section 3 of the National Stolen Property Act (Act of May 22, 1934, c. 333, 48 Stat. 794, as amended; 18 U. S. C. 415) 2, 10

Section 269 of the Judicial Code (28 U. S. C. 391) 10

18 U. S. C. 550 10

18 U. S. C. 551 10

28 U. S. C. 391 6

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 277

ANTHONY JOSEPH PETRILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 103–110) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 8, 1942 (R. 110–111). The petition for a writ of certiorari was filed August 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by the failure to prove his alleged aliases which were read to the jury by the prosecuting attorney in his opening statement.

2. Whether the evidence was sufficient to sustain the conviction.

3. Whether a fatal variance in proof resulted by virtue of the fact that the indictment described in particular stolen articles alleged to have been transported in interstate commerce, whereas the evidence established the transportation of the property only generally.

STATUTE INVOLVED

Section 3 of the National Stolen Property Act (Act of May 22, 1934, c. 333, 48 Stat. 794, as amended; 18 U. S. C. 415) provides, in part:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

STATEMENT

On June 23, 1941, an indictment in one count was filed in the District Court of the United States for the Eastern District of Missouri charging that petitioner, on or about February 8, 1940, unlawfully transported from Dallas County, Texas, to St. Louis County, Missouri, certain articles of jewelry, valued at approximately $18,635, with knowledge that they had been stolen, in violation of Section 3 of the National Stolen Property Act, *supra* (R. 5–9). Petitioner was found guilty (R. 11–12) and sentenced to imprisonment for ten years (R. 13–14). On appeal to the Circuit Court of Appeals for the Eighth Circuit the conviction was affirmed (R. 110–111).

The evidence presented by the Government may be summarized as follows:

At 8:30 o'clock on the morning of February 7, 1940, Irving Thomas Slifkin, a traveling jewelry salesman, departed from Dallas, Texas, by autobile in the direction of Little Rock, Arkansas (R. 17). He had in his possession approximately $13,000 worth of jewelry, wholesale value (R. 21). Fifteen miles north of Dallas his car was forced off the road by another car, from which emerged two men, one of whom brandished a gun. Slifkin was compelled to lie down in the rear of his car and covered with some coats. The men took possession of the brief case containing the jewelry, and drove Slifkin's car about 200 miles to a point

35 miles west of Texarkana, Texas, where they abandoned Slifkin and his car on a lonely dirt road six hours later. (R. 19–22.)

Early in the morning of the following day a car was observed speeding east on Highway 66 south of Kirkwood, Missouri, by Officers McIntyre and Bieber of the Missouri State Highway Patrol. Three men were seen in the car, two in the front seat and one in the rear. The officers started to overtake the car, which then proceeded to increase its speed to 80 or 85 miles per hour. After a four-mile chase the pursued car struck a rough spot in the road and skidded. The front door on the driver's side was thrown open, and the car overturned. The patrolmen arrived at the scene of the accident a few seconds later and saw that there were then only two men in the car, both unconscious, one in front and one in back. They looked around for the third man, and found petitioner in the driveway of a filling station 75 feet from the overturned car. He was in a dazed condition, "cut and bruised about the face." All three were put in an ambulance, and the driver of the ambulance was requested to place a "detainer" on them at the hospital. R. 34–37, 43–46.) Only one of the three reached the hospital, however, petitioner and one of his companions[1] having apparently escaped on the way (R. 41, 47).

[1] This companion was tried earlier and his conviction for the same offense was affirmed in *Russell* v. *United States*, 119 F. (2d) 686 (C. C. A. 8), where substantially the same contentions as are here presented were made.

A brief case containing jewelry was found in the car, together with several revolvers, some ammunition, a metal saw, and a "jimmy bar." The jewelry was taken to patrol headquarters in Kirkwood. (R. 37–40, 45–47.) Several days later Slifkin identified it as the jewelry taken from him in Texas, except that five or six of the stolen pieces, valued at about $2,000, were missing (R. 23, 24, 26). The retail value of the recovered jewelry was estimated by a Kirkwood jeweler, to whom the jewels were brought for appraisal, at approximately $18,000 (R. 62).

The patrol officers' identification of petitioner as the man found in a dazed and bleeding condition near the scene of the accident was amply corroborated (R. 51, 54, 58).

Petitioner did not testify at the trial and presented no evidence in his behalf.

ARGUMENT

1. Petitioner contends (Pet. 5, 6, 10, 12–14) that he was denied a fair trial because the prosecuting attorney, in his opening statement, read the indictment to the jury, including a list of 28 aliases, and then failed to prove the aliases, though he stated at the time that he would prove them (R. 15).[2] While there are dicta criticizing this

[2] In the argument before the circuit court of appeals, the prosecuting attorney stated that he was prepared to establish, by certified records of prior convictions, all 28 of the aliases alleged in the indictment, for the purpose of impeachment, had petitioner testified in his own behalf (R. 110).

practice in *United States* v. *Solowitz*, 99 F. (2d) 714, 715 (C. C. A. 7), and *D'Allessandro* v. *United States*, 90 F. (2d) 640, 641 (C. C. A. 3), upon which petitioner relies, it should be pointed out that the trial court specifically instructed the jury that, since no evidence had been introduced to prove any of the alleged aliases, it should not consider them or allow them to weigh against petitioner in any way (R. 79). Cf. *Chadwick* v. *United States*, 117 F. (2d) 902, 905 (C. C. A. 5), certiorari denied, 313 U. S. 585. Moreover, in view of the overwhelming evidence of petitioner's guilt (See Statement, *supra*), the incident complained of cannot be said to have affected his substantial rights and therefore does not constitute reversible error (28 U. S. C. 391).[3]

[3] Petitioner likewise complains (Pet. 5, 6–7, 14–15, 26–27) of the use of the word "gangsters" by the prosecuting attorney in referring to petitioner and his companions in his oral argument to the jury. However, the record indicates that the statement may have been provoked by the argument of petitioner's counsel (see R. 76), and, in any event, since the record does not contain the arguments of either side, the incident complained of presents nothing for appellate review. *Vause* v. *United States*, 53 F. (2d) 346, 354 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Murphy* v. *United States*, 39 F. (2d) 412, 414 (C. C. A. 8); *Hoffman* v. *United States*, 20 F. (2d) 328, 329 (C. C. A. 8). Moreover, the statement was immediately retracted upon the objection of petitioner's counsel and the jury was instructed by the court to disregard it (R. 76). Furthermore, in view of the testimony of the patrol officers as to finding several revolvers, a liberal supply of ammunition, and various other tools of the gangster in the car involved in the accident (R. 38–39, 45–46), it is doubtful whether the epithet was improper. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240.

2. Petitioner's contention (Pet. 5, 10, 15–19) that the evidence is insufficient to sustain the conviction is without merit. From the evidence summarized in the Statement (*supra,* pp. 3–5), it is clear that petitioner was an occupant, and probably the driver, of an automobile containing jewelry of the value of $5,000 or more that had been stolen fifteen hours earlier in a nearby state. This evidence, which petitioner did not attempt to explain away, taken together with the implications of his flight from the pursuing officers, justified the inference that he had transported or caused to be transported the jewelry from the place where it was stolen to the place where he was seen in possession of it[4] (cf. *Russell* v. *United States,* 119 F. (2d) 686, 688 (C. C. A. 8); *Bennett* v. *United States,* 104 F. (2d) 209, 210 (App. D. C.); *Husten* v. *United States,* 95 F. (2d) 168, 170

[4] Petitioner's contention (Pet. 5, 11, 23–24) that the court erroneously charged that the evidence showed that the defendant was in possession of the stolen property is not only without merit, but misstates the record. As is seen from the portion of the court's charge complained of (Pet. 23, R. 82), the court qualified its reference to "the fact * * * that the jewelry was shortly thereafter in the possession of the defendant" with the words "if you believe it to be a fact." Furthermore, the reason alleged by petitioner (Pet. 24) for the court's withdrawal of this part of the charge does not accurately reflect the record. The court withdrew this part of its charge (R. 84) at the request of counsel for petitioner (R. 83), but counsel's request was based on the ground that the charge was an erroneous statement of law, not that it misstated the evidence.

(C. C. A. 8); *United States* v. *Di Carlo*, 64 F. (2d) 15, 16–17 (C. C. A. 2); *Drew* v. *United States*, 27 F. (2d) 715, 716 (C. C. A. 2)), and that he was well aware of its stolen character.[5] The elements of interstate transportation and guilty knowledge were therefore established by circumstantial evidence of the most convincing sort which excluded every reasonable hypothesis but that of guilt. Hence the court properly submitted the case to the jury.

3. Petitioner contends (Pet. 5, 7, 10, 19–21) that there was a fatal variance between the allegations of the indictment and the proof in that the indictment alleged the interstate transportation of particularly described articles of stolen jewelry, whereas the evidence established only generally the transportation of the jewelry described in the indictment. We think the contention lacks merit. Slifkin was handed a copy of the indictment and testified that the jewelry described therein was the jewelry which he had in his possession on February 7, 1940, and of which he was robbed (R. 24–25).

[5] *Husten* v. *United States*, 95 F. (2d) 168, 170 (C. C. A. 8); *Balman* v. *United States*, 94 F. (2d) 197, 199 (C. C. A. 8); *Wilkerson* v. *United States*, 41 F. (2d) 654, 657 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Boehm* v. *United States*, 271 Fed. 454, 456–457 (C. C. A. 2); cf. *Wilson* v. *United States*, 162 U. S. 613, 619; *McNamara* v. *Henkel*, 226 U. S. 520, 525. *Willsman* v. *United States*, 286 Fed. 852 (C. C. A. 8), cited by petitioner (Pet. 22), is clearly not in point, for, unlike the present case, there was nothing to indicate that the defendant was the agent or confederate of the one who had possession of the drugs there involved.

He further testified that the jewelry which was found in the car involved in the accident and which was taken to the Kirkwood patrol office was the same as that stolen from him in Texas, except that five or six pieces were missing (R. 23, 24, 26). Thus, the evidence clearly established that petitioner had transported in interstate commerce at least all but five or six of the articles of jewelry named in the indictment.[6] While it would appear, therefore, that there was a slight variance between the allegations of the indictment and the proof, it is clear that the variance in no way prejudiced petitioner, nor does he so contend. "The true inquiry," this Court has said, "is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger* v. *United States,* 295 U. S. 78, 82.[7] Obviously, there was no violation of

[6] Excluding these articles, the value of which was placed at about $2,000 (R. 24), the value of the remaining articles was, of course, well above the $5,000 minimum jurisdictional value.

[7] See also *United States* v. *Brims*, 272 U. S. 549, 551–553; *Hoke* v. *United States*, 227 U. S. 308, 324; *Bennett* v. *United*

either of these requirements in the instant case. Hence, the variance was nonprejudicial and immaterial, and would not warrant reversal under Section 269 of the Judicial Code (28 U. S. C. 391).[8]

States, 227 U. S. 333, 338–339; *Hall* v. *United States*, 168 U. S. 632, 638–639; *Montgomery* v. *United States*, 162 U. S. 410, 411; *Dunbar* v. *United States*, 156 U. S. 185, 191; *Bimbo* v. *United States*, 82 F. (2d) 852, 855 (App. D. C.), certiorari denied, 297 U. S. 721; *Rosenblatt* v. *United States*, 271 Fed. 435, 438 (C. C. A. 2), certiorari denied, 256 U. S. 695.

United States v. *Howard*, 26 Fed. Cas. No. 15,403 (C. C., D. Mass.), and *Kutler* v. *United States*, 79 F. (2d) 440 (C. C. A. 3), cited by petitioner (Pet. 20–21), are not in conflict with the decision below. In the *Howard* case, the alleged variance was held immaterial and a motion for a new trial based thereon was denied. In the *Kutler* case, the variance was material and substantial, and for that reason the judgment of conviction was reversed.

[8] Petitioner also contends (Pet. 5, 11, 25–26) that the sentence of ten years' imprisonment (the maximum permissible under 18 U. S. C. 415, under which petitioner was indicted) is void because it exceeds the maximum sentence permissible under 18 U. S. C. 551, which provides that accessories after the fact shall be imprisoned not exceeding one-half the longest term of imprisonment prescribed for the punishment of the principal. This contention is based on the mistaken belief that the court was referring to accessories after the fact when it charged the jury (R. 82) that "there is no distinction as between the guilt of a principal and the guilt of an accessory; that one may be charged and prosecuted as a principal, and if it turns out that he is only an accessory, he may nevertheless be convicted." It is clear from the court's definition of an "accessory" as "one who wilfully aids, abets, counsels, or commands the commission of the offense" that reference was made to 18 U. S. C. 550, which makes those who aid, abet, counsel, command, etc. the commission of a federal offense principals, and hence subject to the same penalties as principals.

CONCLUSION

The case was correctly decided below, and no question requiring review by this Court is presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,

PHILIP R. MONAHAN,
Attorneys.

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